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No. 99-936

In The

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

On Writ Of *Certiorari* To The
United States Court Of Appeals
For The Fourth Circuit

MOTION FOR LEAVE TO FILE AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL COALITION FOR CHILD PROTECTION REFORM, NATIONAL CENTER FOR YOUTH LAW, JUVENILE LAW CENTER, THE CHILDREN AND FAMILY JUSTICE CENTER, THE CHICAGO COALITION FOR THE HOMELESS, ILLINOIS ASSOCIATION FOR CHILDREN, and LOYOLA UNIVERSITY CHILDLAW CENTER IN SUPPORT OF PETITIONERS

DOROTHY E. ROBERTS
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 E. Chicago Ave.
Chicago, Illinois 60611
(312) 503-0397

*CAROLYN A. KUBITSCHEK
LANSNER & KUBITSCHEK
325 Broadway
New York, New York 10007
(212) 349-0900

Attorneys for Amici Curiae
*(*Counsel of Record)*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Sup. Ct. Rule 37.2, Amici curiae – the National Coalition for Child Protection Reform, the National Center for Youth Law, the Juvenile Law Center, Children and Family Justice Center of the Northwestern University School of Law, Chicago Coalition for the Homeless, Illinois Action for Children and Loyola University ChildLaw Center – move for leave to file the attached brief in support of the Petitioners.

In the decision below, a divided panel of the Fourth Circuit upheld Respondents' policy of conducting non-consensual urine toxicology tests on certain pregnant women and arresting those who tested positive. Respondents thereby separated these women from their children. The Respondents claimed that the policy promotes the interests of children, and the Court of Appeals agreed.

Amici have expertise in the issues of child welfare, children's advocacy, mental health, housing, and other issues affecting children. Based upon that expertise, *Amici* believe that, rather than benefitting children, the "arrest upon positive toxicology" policy harms children. This brief is offered to highlight these misunderstandings and to alert the Court to real harms that children suffer when they are separated from their mothers, even if the mothers have used drugs. The Fourth Circuit's decision, if left undisturbed, will allow governmental organizations to ignore the important psychological needs and Constitutional rights of vulnerable children. It will further allow cities to bypass programs and protocols put

into place by Federal and State governments which ultimately assure these children important services – services which the children will not receive if their families are involved in the criminal justice system rather than the child welfare system.

This motion is necessary because Respondents have declined to consent to the filing of the following brief.

INTEREST OF AMICI CURIAE

As the names of the Amici organizations suggest, and the descriptions of these organizations appended to the attached brief underscore, Amici are organizations of professionals – attorneys, professors, law students, social workers, policy makers, researchers, community organizers, psychologists, journalists – who are all dedicated to the goal of improving the lives of children. Some Amici work to change laws and policies concerning child protection; others provide much-needed services and legal assistance to children; and still others create policies and programs that will assist children. What unites these organizations and practitioners is a belief that children who are separated from their mothers as a result of a single positive drug test, with no evidence of parental unfitness, will suffer harm.

Amici are concerned that, contrary to promoting the interests of vulnerable newborn children, a policy which calls for the arrest of those children's mothers based upon a single positive urine toxicology, after nonconsensual testing, causes children to suffer unnecessary psychological harm and trauma from being separated from their

mothers. Amici are also concerned that such a separation interferes with the children's constitutionally protected liberty interest in their relationship with their mothers.

In addition, Amici note that the Respondents' policy runs contrary to federal and state laws which direct that child welfare proceedings and services should take place in a civil and not a criminal context. Under these laws, certain services are available to preserve families, even families where the mothers have substance abuse problems. In the instant action, the Respondents did not offer the less disruptive preventive services prior to separating the mothers and children through the arrest of the mothers. Amici submit that the tragic result of such a policy is that children are deprived of both their families and important services.

Respectfully submitted,

CAROLYN A. KUBITSCHEK

*CAROLYN A. KUBITSCHEK
LANSNER & KUBITSCHEK
325 Broadway
New York, New York 10007
(212) 349-0900

DOROTHY E. ROBERTS
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0397

Attorneys for Amici
**Counsel of Record*

June 2, 2000

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BRIEF OF *AMICI CURIAE*

INTERESTS OF AMICI NATIONAL COALITION FOR CHILD PROTECTION REFORM

Amicus curiae National Coalition for Child Protection Reform ("NCCPR") is an organization of professionals – including attorneys, law professors, psychologists, and journalists – who are dedicated to improving child welfare systems through public education and advocacy. NCCPR, a tax-exempt non-profit organization[1] founded at a 1991 meeting at Harvard Law School, is incorporated in Massachusetts and headquartered in Alexandria, Virginia, with offices in New York City and Chicago. Further information about the organization is available on its website, www.nccpr.org.

NCCPR devotes much of its attention to public education concerning widespread public misconceptions about the child protective system and its impact on the children it is intended to serve. Lawyer members of NCCPR also individually have litigated numerous precedential cases involving child protection policies and proceedings. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), *cert. den.*, 120 S.Ct. 1832 (2000); *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Youakim v. McDonald*, 71 F.3d 1274 (7th Cir. 1995), *cert. den.*, 518 U.S. 1028 (1996); *R.C. v. Nachman*, 969 F. Supp. 682, *aff'd per curiam*, table, 145 F.3d 363 (11th Cir.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

1998); *Norman v. McDonald*, 930 F. Supp. 1219 (N.D. Ill. 1996).

NATIONAL CENTER FOR YOUTH LAW

Amicus curiae National Center for Youth Law ("NCYL"), founded in 1970 and based in Oakland, California, engages in litigation, legislative and administrative advocacy, and policy development on behalf of low-income children, adolescents, and their families. NCYL also provides technical assistance, training and publications to attorneys, health and social service providers, and other child-serving professionals on legal issues affecting low-income children and youth. NCYL's work includes advocacy to promote effective and balanced child welfare policies; improve the quality of states' child welfare systems; and ensure that families have fair and adequate access to services and supports needed so that children can safely remain in or return to their parents' homes.

JUVENILE LAW CENTER

Amicus curiae Juvenile Law Center ("JLC") is a private, non-profit public interest law firm based in Philadelphia, Pennsylvania that advances the rights and well-being of children in jeopardy. Since 1975, JLC has represented children in cases involving Pennsylvania's child welfare, juvenile justice, mental health and public health and public health systems, and has worked to ensure, *inter alia*, that children's constitutional and statutory

rights are rigorously enforced throughout these systems. JLC has also worked on children's policy issues at the national level. JLC has participated as amicus curiae in numerous cases involving children's rights in both the juvenile justice and child welfare systems before the Pennsylvania Supreme and Superior Courts, United States Courts of Appeals and the United States Supreme Court.

CHILDREN AND FAMILY JUSTICE CENTER

Amicus curiae Children and Family Justice Center of the Northwestern University School of Law ("Center") is a multi-disciplinary project employing attorneys, social workers and researchers. Through the Law School's Legal clinic, the Center provides legal advocacy for both children and indigent parents in neglect and abuse proceedings in the Circuit Court of Cook County's Juvenile Court, as well as in the appellate courts of Illinois. In addition, the Center trains law and social work students and attorneys, conducts research, and develops policy in the field of child welfare. The Center has a particular interest in the issues raised by this case, arising out of its work in the area of developing standards governing state intervention in the parent-child relationship.

CHICAGO COALITION FOR THE HOMELESS

Amicus curiae Chicago Coalition for the Homeless ("CCH") is a not-for-profit advocacy organization in existence for almost twenty years that is dedicated to

addressing the causes and effects of homelessness. CCH works with many homeless families and has seen first-hand the destructive impact of government policies that needlessly separate children from their parents. CCH works to empower women to solve their problems and secure needed services, including drug treatment, educational opportunities, health care and housing. CCH participates in many legal efforts to protect the constitutional and statutory rights of persons who are homeless.

ILLINOIS ACTION FOR CHILDREN

Amicus curiae Illinois Action for Children ("IAFC") is a non-profit child welfare advocacy organization based in Chicago, Illinois. IAFC sponsors programs and projects that educate child welfare professionals to better serve children and families; to engage the public in child welfare reform and to provide opportunities for concerned citizens to volunteer as mentors and advocates for neglected and abused children. IAFC develops policy in the field of child welfare, emphasizing the preservation and rehabilitation of families so that children can safely remain in their own homes.

LOYOLA UNIVERSITY CHILDLAW CENTER

Amicus curiae Loyola ChildLaw Center houses the children's law programs at Loyola University Chicago School of Law. The ChildLaw Center's mission includes training law students to become effective legal advocates for children, providing quality legal representation to

child clients in legal proceedings, and improving the quality of justice for children and their families through legislative and policy advocacy. The ChildLaw Center represents over 100 children, and has a particular focus on abuse and neglect and foster care concerns. The Child-Law Center also offers an extensive training curriculum for attorneys, social workers and other child welfare professionals in pediatric law and child and family advocacy. ChildLaw Center faculty members have worked on state and federal legislative initiatives, as well as with the Cook County Juvenile Court and State of Illinois child welfare systems to develop appropriate standards for state intervention in family matters.

SUMMARY OF ARGUMENT

The City of Charleston and the other Respondents (collectively "City") claimed that their "arrest upon positive toxicology" policy promotes the interests of children. Amici submit that it does not. First, the children's most fundamental interest is in remaining in the care and custody of their mothers. No serious danger to the children was demonstrated by virtue of a single positive toxicology screen as would justify the most extreme intrusion into the family – removal of the mother through arrest. The City policy incorrectly assumed that a single positive drug toxicology was conclusive proof of parental unfitness.

Contrary to promoting their interests, the children are likely to have suffered serious psychological harm as a result of being deprived of the chance to bond with

their parents at a critical point of their lives – just after birth. There is empirical evidence that even infants who have been exposed prenatally to cocaine, as a group, fare better in the care of their mothers than in the care of relatives or foster parents.

The City's policy contravenes a key policy that Congress and the state legislatures have adopted to protect children: provision of child protective services in a civil, not criminal, context. Those services include services to preserve families, rather than destroy them. Rather than pursue that aim of child protection, the City unwisely turned to punitive measures that disrupted families. By resorting exclusively to the punitive approach of police intervention, the policy also failed to make use of less disruptive preventive services available to child protection agencies. The City's program constituted not only an unjustified intrusion into the family, but also an unsound child welfare policy.

ARGUMENT

POINT I
SEPARATING CHILDREN FROM THEIR MOTHERS HARMS CHILDREN

The City arrested and incarcerated the petitioners in the instant action, and more than 20 other new mothers and pregnant women, based upon a single positive urine toxicology (in some cases two toxicologies), obtained through nonconsensual urine testing. The City made a calculated decision not to report positive toxicologies to the Department of Social Services, but rather to report directly to the Police Department (Plaintiff's Exhibit 28,

reproduced at Appendix to the Petition for Writ of Certiorari 73) which would then arrest the women based solely upon the positive urine toxicology. As a result, dozens of newborn children were deprived of their mothers for the period of the mothers' arrest and incarceration.

Many of the newborns had older siblings. Petitioner Crystal Ferguson, for example, had two sons. (JA 457)[2] Siblings are also deprived of the love and companionship of their mothers, when their mothers are arrested and incarcerated.

The City defended the policy as justified by "a desire to protect the health of children. . . . " *Ferguson v. City of Charleston, S.C.*, 186 F.3d 469, 475 n.3 (4th Cir. 1999). Indeed, one of the nurses at the Medical University of South Carolina Hospital asserted that the "reason for the policy was 'concern . . . for the health and safety and care of these fetuses and soon to be children. . . . ' " *Id.*

No infants or children were parties to the action. Yet it is their purported interests which motivated the Court of Appeals to reach the decision to uphold the drug testing, arrest and incarceration of their mothers. The court concluded that the "primary goal" of the policy was "to reduce health effects on children exposed to cocaine in utero." *Ferguson v. City of Charleston, S.C.*, 186 F.3d 469, 478 (4th Cir. 1999).

Amici do not dispute the interest of the government in protecting children from abusive or neglectful parents.

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[2] "JA" refers to the Joint Appendix, submitted by Petitioners with their brief.

However, the "arrest upon positive toxicology" policy which the City has chosen to effectuate that interest has been counterproductive. Instead of helping newborns, the policy of arresting mothers severely harms newborns and their older siblings.

A. Psychological Harm

As the courts have realized, "society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family." *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999), *cert. den.*, 120 S.Ct. 1832 (2000), quoting *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993). Indeed, "governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child. . . . " *Wallis v. Spencer*, 202 F.3d 1126, 1130 (9th Cir. 2000).

Here, dozens of women were arrested. As a result of those arrests, dozens of newborn infants were separated from their mothers at the beginning of their lives. The older siblings of those newborns also lost their mothers.

The neo-natal period is a crucial time in a baby's life, when parents and child have the best chance to form the emotional bonds that should last a lifetime. Child abuse researcher Ray Helfer has written: "When this sensitive period goes well, the relationship between new parents

and their newly-born infant has the potential of progressing far beyond . . . expectations . . . [W]hen this interaction goes poorly, a vicious cycle can develop when the infant and the new parent[s] do not engage, resulting in a degree of discontent and frustration which can lead to a breakdown in the interactions between [parent and newborn]." Helfer, *The Perinatal Period: A Window of Opportunity for Enhancing Parent-Infant Communication: An Approach to Prevention*, 11 Child Abuse and Neglect: The International Journal 566 (1987).

Other researchers go further: "because the human infant is wholly dependent upon his mother or caretaker for all his physical and emotional needs, the strength of these attachment ties may well determine whether he will survive and develop optimally." Klaus and Kennell, *Mothers Separated from their Newborn Infants*, 17 Pediatric Clinics of North America 1015 (1970). Moreover, early separation of a newborn from his or her mother "may be a significant factor" causing child abuse. *Id.* Thus, by separating newborns from their mothers, the "arrest upon positive toxicology" policy may, ironically, promote the very harm it is allegedly intended to prevent. Such harm to children cannot be justified under any circumstances, least of all in the name of child protection.

Infancy is a state of helplessness that requires the parent's day-to-day care in order to build the bond between parent and child. *See*, J. Goldstein, A. Freud & A.J. Solnit, *Before the Best Interests of the Child* 8 (1979). Three of the leading experts on child development have concluded that: "The younger the child, the greater is his need for [his parents]. When family integrity is broken or weakened by state intrusion, his needs are thwarted. . . .

The effect on the child's developmental progress is invariably detrimental." *Id.* at 9.

Of course, there are times when the harm of a parent's drug addiction is worse than the harm caused by taking away the child, and the child must be removed from the home. It is not the position of amici that children should never be removed from drug-using parents. But the City of Charleston takes the drastic, and entirely erroneous, position that children always should be taken from such parents. The Charleston policy assumes that all newborns always are better off removed from parents who have a drug problem – or even from parents who are presumed to have a drug problem based on a single urine test. This is manifestly untrue.

The "mother's ongoing substance use, by itself, should not be a criterion for mandating removal from the home." United States Department of Health and Human Services, *Improving Treatment for Drug-Exposed Infants* 32 (1993). By contrast, the police, in carrying out the policy of the City of Charleston, will separate a child from the parent, by placing the parent in jail, based solely upon the results of such a test.

That a newborn suffers harm when separated from his or her mother, even if the mother has ingested cocaine during her pregnancy, is not merely a hypothesis. A University of Florida study of "crack babies" compared newborns placed in foster care to those who were allowed to remain with their mothers. At six months of age, all of the infants were tested. The infants placed in foster care were significantly less likely to reach, roll over

or sit up, a finding which the authors termed "surprising." Wobie, Behnke, et al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine* (Paper presented at joint annual meeting of the American Pediatric Society and the Society for Pediatric Research, May 3, 1998).

Other experts have also concluded that it is better for children to remain with their mothers: "staying at home with an addicted mother who is actively participating in a rehabilitation program can, in many cases, be the more promising and safer route for the child." Willwerth, *Should We Take Away Their Kids? Often The Best Way to Save the Child is to Save the Mother as Well*, Time, May 13, 1991.

Other researchers have also concluded that removing children from their families "may cause serious psychological damage – damage more serious than the harm intervention is supposed to prevent." Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 994 (1975). In addition, if those children are placed in foster care, "the mere act of placement and the uncertain position of a child in foster care creates psychological difficulties, even for children who are not required to move to different foster homes." *Id.* at 995; *see also, K.H. v. Morgan*, 914 F.2d 846, 853, (7th Cir. 1990) ("[W]rong lies . . . in a system of foster care that is unable to achieve a reasonable balance among safety, competence, and stability. . . . Good foster parents are difficult to find.")

Arresting and incarcerating mothers is one of the most drastic ways of separating children from parents.

"The arrest and incarceration of a parent can have a profound effect on a child. It can cause financial dislocation to the family, family dismemberment or dysfunction, and great social and emotional pain." The Osborne Association, *How Can I Help? Working with Children of Incarcerated Parents* 3 (1998). And when children watch their mothers being taken away in handcuffs, as happened at least once in the instant case (JA 779), the trauma to the children is both overt and immediate.

This is not to suggest that pregnant women who use drugs do not need any preventive services. However, the "arrest" prong of the "arrest upon positive toxicology" policy portends greater harm to these newborn and vulnerable children than the harm of leaving them with their mothers, particularly since numerous studies have found that women who use illicit drugs can be adequate parents. *See* Boyd, *Mothers and Illicit Drugs: Transcending the Myths*, 14-16 (1999) (listing at least twelve studies which reach that conclusion).

A panel of experts convened by the United States Department of Health and Human Services has concluded that effective treatment for a child exposed to drugs *in utero* must occur within the relationship of the mother-child dyad, because that relationship defines the child's existence early in life. United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Improving Treatment for Drug-Exposed Infants* 21 (1993). The panel also pointed out that those children need follow-up psychological services that include both mother and child. *Id.* at 27. Specifically, it emphasized that outreach programs and community-based organizations need to work with

the mother and child to provide the full range of social services available to assist the infant. *Id.* The panel concluded that the best way to help the drug-exposed child is to help the mother recover from addiction. *Id.* at 28. The panel also stressed that treatment should be nonthreatening, nonstigmatizing and supportive, *id.*, exactly the opposite of the policy of the City of Charleston.

B. Constitutional Harm

The importance of the psychological attachment of child to parent is reflected in the United States Constitution. This Court has long recognized the "rights and privileges inherent in family and personal relations." *M.L.B. v. S.L.J.*, 519 U.S. 107, 128 (1996) (Kennedy, J., concurring). The family, as a unit, is protected by the Constitution. "[T]he right of the individual . . . to marry, establish a home and bring up children" is "essential." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It is one of the "basic civil rights of man. . . . " *Skinner v. Oklahoma*, 316 U.S. 536, 541 (1942).

The right of the family to exist, free of unwarranted state interference, is a right "far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953). Indeed, it is one component of the right to liberty, a right guaranteed by the Fourteenth Amendment of the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 746 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Constitution "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

The constitutionally protected liberty interest in the parent-child relationship is not the right of the parent alone. Rather, it is "the right of the *family* to remain together without the coercive interference of the awesome power of the state." *Robison v. Via*, 821 F.2d 913, 920 (2d Cir. 1987), quoting *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (emphasis added).

The right to preservation of family integrity "encompasses the reciprocal rights of both parent and children." *Greene v. City of New York*, 675 F. Supp. 110, 114 (S.D.N.Y. 1987). Thus, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760 (1982). The government's interference with that interest, by depriving a child of his or her parent, is a compensable violation of the Constitution. *Greene, supra.*

The courts of appeals which have reached that issue are unanimous. Thus, it is has specifically been held that children have "liberty interests in continued companionship with their parents." *Croft v. Westmoreland County Children and Youth*, 103 F.3d 1123, 1126 n.4 (3d Cir. 1997). A "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." *Curnow v. Ridgecrest Police*, 952 F.2d 321, 326 (9th Cir. 1991). "The integrity of the parent-child relationship is harmed by depriving children of adult care." *White v. Rochford*, 592 F.2d 381, 383 n.1 (7th Cir. 1979). The government's interest in protecting children "embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully

exercised authority of their parents." *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

Because children have a weighty constitutional interest in being raised by their own parents, the state requires a compelling interest in order to intrude on the family. A single positive toxicology screen, without any other evidence of parental unfitness, does not constitute a sufficiently compelling justification for the extensive, punitive intrusion that the policy effects.

In the first place, a positive toxicology may be false; ten percent of the positive results are false positives. Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 Journal of Psychoactive Drugs 305, 312 (1984). Moreover, even if true, the toxicology screen reveals only that the mother ingested drugs shortly before the test. "It tells us nothing about the extent of the mother's drug use, any harm to the baby, or the mother's parenting abilities. Equating evidence of maternal drug use with child neglect circumvents the inquiry into the mother's competence to care for her child that is customarily necessary to deprive a parent of custody." Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 160 (1997).

By contrast to the City policy, the Charleston County Department of Social Services, in handling cases of child abuse and neglect based upon allegations of drug use by the mother, had a policy of not making child welfare decisions based upon a single positive toxicology. "No single factor," not even a positive drug screening test, "was ever enough to make a determination of child abuse. That was always made as a result of analyzing

every factor involving the environment of the children." (Durban Tr. 89-90; JA 427).

In investigating cases of child abuse or neglect based upon alleged drug use, the Department "would send an assessment worker who was trained in identifying risks to children to interview the relevant players, anyone who had been providing treatment to the parents, the parent themselves and extended family members. . . . And a decision would be made as to whether or not the behavior that was reported constituted a risk to the child. The next step in that analysis would be . . . whether it was a risk sufficient to warrant the removal of the child from that environment or whether it was the risk that could be addressed with the family unit intact[,] in other words, leaving the child where the child was and working with the entire family unit without removing the child." (Durban Tr. 74-75; JA 414). Amici submit that such a policy is better for children, from both a psychological and a constitutional standpoint, than the "arrest upon positive toxicology" policy at issue in the instant action.

POINT II

CHARLESTON'S POLICY CONTRAVENES THE INTENT OF CONGRESS AND OF THE STATE LEGISLATURES

The "arrest upon positive toxicology" policy cannot be justified in terms of protecting children, because that policy conflicts with South Carolina's own child welfare laws and policies. It is also in conflict with federal law and the laws of all 49 other states.

The State of South Carolina must not only "safeguard the well-being and development of endangered children," but, in doing so, it must also "preserve and stabilize family life, wherever appropriate. . . . " S.C. Code § 20-7-480 (1976). The law of South Carolina itself recognizes that "family life [is] the most appropriate environment for the care and nurturing of children." S.C. Code § 20-7-20(D) (1976). Consequently, South Carolina requires that "[t]he state shall direct its efforts first to strengthen and encourage family life as the most appropriate environment for the care and nurturing of children." S.C. Code § 20-7-20(D).

In child protective situations, South Carolina law emphasizes voluntary compliance, and discourages coercive governmental intervention. "The agency may petition the family court to invoke the jurisdiction of the court . . . to intervene, but in no case shall the agency threaten action to coerce participation." S.C. Code § 20-7-650(K). Even when the parents refuse to cooperate, the child is not to be separated from the parent unless there is clear and convincing evidence that the child cannot be protected from any further harm without being removed. *See*, S.C. Code § 20-7-736(E)(2). Those statutes reflect mainstream child welfare policy, as expressed in federal statutes and policy guidance, social science research, and in other state's laws.

Congress has mandated that all states make reasonable efforts to keep families together, even where the children in those families may suffer from abuse or neglect. That mandate requires that all states have preventive services programs. Specifically, states must have a plan which provides that:

> reasonable efforts shall be made to preserve and reunify families
>
> (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return home. . . .

42 U.S.C. § 671(a)(15)(B). States that fail to comply risk the loss of federal funding. 42 U.S.C. § 671(b). *See also, Suter v. Artist M.*, 503 U.S. 347, 348 (1992). Federal law also provides that "in determining reasonable efforts to be made with respect to a child, . . . the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A). For all of the reasons stated earlier, removing a newborn from a parent because of a single positive urine test clearly is detrimental to the health and safety of that child.

After careful study over a lengthy period of time, including the holding of numerous hearings, Congress found that:

> the problem of child abuse and neglect requires a comprehensive approach that:
>
> (A) integrates the work of social service, legal, health, mental health, education, and substance abuse agencies and organizations; . . .
>
> (C) emphasizes the need for abuse and neglect prevention, investigation, and treatment at the neighborhood level;
>
> (D) ensures properly trained and support staff with specialized knowledge, to carry out their child protection duties. . . .

Pub. L. 102-295 § 102(a)(3), 106 Stat. 188 (1992).

Federal regulations further explain and clarify that mandate. Those regulations provide for preventive services, which may include services such as substance abuse treatment, housing, mental health, health, education, training, child care, and informal support networks. 45 C.F.R. § 1355.25(f).

The mainstream child-centered approach involves primarily the child welfare authorities, not criminal justice authorities. "Within the child welfare system, child protective services (CPS) is the administrative unit responsible for investigating allegations of abuse and neglect. The focus of CPS is on strengthening and empowering the families who are at risk of child abuse and neglect; removing children from their home is seen as a last resort when working with the family has failed." United States Department of Health and Human Services, Public Health Service, *Improving Treatment for Drug-Exposed Infants* 31 (1993). When a pregnant woman uses drugs, involuntary civil commitment and criminal prosecution, ostensibly for the benefit of the fetus, should not be used at all. *Id.* at 31.

The primary goal of child welfare agencies is to foster the health of families and to keep them intact. "Child protective services agencies are mandated to help keep families together." United States Department of Health and Human Services, Public Health Service, *Pregnant, Substance-Using Women* 58 (1993). That goal recognizes that the family is an entity which deserves protection from unwarranted state intervention. "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither

supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Thus:

> national policy should strengthen families to remedy the causes of child abuse and neglect, provide support for intensive services to prevent the unnecessary removal of children from families, and promote the reunification of families if removal has taken place. . . .

Pub. L. 102-295 § 102(a)(7), 106 Stat. 188 (1992).

The states have heeded the Congressional mandate, and have incorporated that mandate into their own statutes. Following the lead of Congress, all fifty states have enacted laws establishing child protection programs. *See*, United States Department of Health and Human Services, National Center on Child Abuse and Neglect, *Child Maltreatment 1995: Reports from the States to the National Child Abuse and Neglect Data System* (1997). Those laws are based upon the premise that the optimum form of child protection is to preserve family ties, not to sever them. Thus, a primary goal of state child protection laws is to keep children safely with their parents.

State statutory schemes are based upon that premise. "[I]t is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home. . . . " N.Y. Soc. Serv. L. § 384-b(1)(a)(ii). Accordingly, "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home. . . . " N.Y. Soc. Serv. L. §384-b(1)(a)(iii). To carry out that obligation, a "social service official shall provide preventive services to a child and his or her family . . . upon a finding by such official

that (i) the child will be placed or continued in foster care unless such services are provided . . . " N.Y. Soc. Serv. L. § 409-a(1)(a).

The statutory schemes recognize the goals of safeguarding endangered children and preserving families are not antagonistic. The state can accomplish both goals – child protection and family preservation – by providing services to the children and families.

Preventive services include a wide array of social services. The state of New York, for example, provides funding for 19 different types of services including, *inter alia*: day care; homemaking assistance; housekeeper/chore services; family planning services; home management services; psychotherapy; parent aides; parenting skills training; transportation of children and families to and from service sites; emergency cash and goods; emergency shelter; rent subsidies; and intensive home-based family preservation services. 18 N.Y.C.R.R. § 423.2(b).

Research has shown that, in most cases, those preventive services programs are effective in keeping families together and, at the same time, keeping children safe from abuse and neglect.

See, e.g., Berquist, et al., *Evaluation of Michigan's Families First Program* (1993); Fraser, et al., *Families in Crisis: The Impact of Intensive Family Preservation Services* (1991) (Utah and Washington State); Bath and Haapala, *Family Preservation Services: What Does the Outcome Research Really Tell Us*, 69 Soc. Serv. Rev. 400 (1994) citing, Wood, et al., *In-Home Treatment of Abusive Families: Cost and Placement at One Year*, 25 Psychotherapy 409 (1988) (California); Schwartz, et al., *Family Preservation Services as an*

Alternative to Out-of-Home Placement of Adolescents (1991) (Minnesota); Wells and Biegel, *Family Preservation Services: Research and Evaluation* 33 (1991) (Minnesota).

In addition to experiments, there is real-world experience. As a result of a consent decree of a class action lawsuit, almost every county in Alabama has fully adopted a comprehensive system of care involving extensive efforts to keep families together tailored to the specific needs of individual families, including families with substance abuse problems. *See, R.C. v. Nachman*, 969 F. Supp. 682, *aff'd per curiam*, table, 145 F.3d 363 (11th Cir. 1998). In those counties, foster care placements have declined by 35 percent. Office of the Court Monitor for the R.C. Consent Decree, Human Systems and Outcomes, Inc. (1999). The independent monitor, appointed by the District Court for the Middle District of Alabama, concluded that children in Alabama are actually safer now than before the efforts to improve on family preservation. Groves, *System of Care Implementation: Performance, Outcomes, and Compliance*, Executive Summary 3 (1996). Each of the evaluations clearly demonstrates that preventive services work: children are both safer than they would be without the services and able to remain with their families.

By contrast, arresting and incarcerating mothers has not been shown to be effective. "The panel does not support the criminal prosecution of pregnant, substance-using women. There is no evidence that punitive approaches work." United States Department of Health and Human Services, *Pregnant, Substance-Using Women* 2 (1993).

By deliberately choosing to arrest women based upon a positive toxicology, and to bypass the Department of Social Services entirely, the City of Charleston has developed an unsound and harmful child welfare policy.

CONCLUSION

For all the aforementioned reasons, *amici curiae* National Coalition for Child Protection Reform, National Center for Youth Law, Juvenile Law Center, Children and Family Justice Center of the Northwestern University School of Law, Chicago Coalition for the Homeless, Illinois Action for Children, and Loyola University Child-Law Center respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

*Carolyn A. Kubitschek
Lansner & Kubitschek
325 Broadway
New York, New York 10007
(212) 349-0900

Dorothy E. Roberts
Northwestern University
School of Law
357 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0397

Attorneys for Amici
**Counsel of Record*

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